Lim Chok v Lim Chik Lock

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22NCVC-81–03 OF 2012
ABDUL RAHMAN SEBLI J
2 MAY 2013

Banking — Financing facilities — Guarantee — Contribution — Personal guarantees given by two guarantors for loans to company — Loan defaulted — One guarantor made payment to bank to avoid foreclosure proceedings — Whether entitled to seek contribution from another co-guarantor — Payment made using company's funds and not guarantor's funds — Contracts Act 1950 s 99

Contract — Guarantee — Liability of guarantor — Contribution — Personal guarantees given by two guarantors for loans to company — Loan defaulted — One guarantor making payment to bank to avoid foreclosure proceedings — Whether entitled to seek contribution from another co-guarantor — Payment made using company's funds and not guarantor's funds — Contracts Act 1950 s 99

The plaintiff and the defendant were father and son respectively. Both were shareholders in several family companies. One of the companies, namely Mascotwood Sdn Bhd ('Mascotwood') had obtained banking facilities from RHB Bank Bhd ('RHB Bank'). The facilities were secured by a charge of a piece of land belonging to another family company, Lim Chok Realty Sdn Bhd ('Lim Chok Realty') and by personal guarantees signed by both father and son. Lim Chok Realty was the principal debtor. Mascotwood defaulted in its repayment to RHB Bank and RHB Bank commenced proceedings against Lim Chok Realty to auction the land. To prevent the auction, the plaintiff paid RM703,240.92 to RHB Bank to settle the whole of Mascotwood's debts. The plaintiff alleged that the RM703,240.92 was his own money and therefore claimed a 50% contribution from the defendant. It was contended that the defendant as co-guarantor was liable to contribute towards the settlement of Mascotwood's debts by the plaintiff. The defendant denied liability to pay the contribution on the grounds that Mascotwood's debt was paid using Lim Chok Realty's funds and not the plaintiff's own money.

Held, dismissing the plaintiff's claim with costs:

(1) On the facts the only reasonable inference that could be drawn was that the RM703,240.92 that the plaintiff used to pay Mascotwood's debt belonged to Lim Chok Realty and not his own personal money. Therefore the question of contribution by the defendant did not arise at

all. The obligation to contribute only would arise if the plaintiff as co-guarantor had used his own money to settle the debts. Lim Chok Realty, being a private limited company had a legal entity of its own separate and distinct from its shareholders and directors. The plaintiff could not claim personal ownership over any money in the company's account (see para 7).

(2) By payment of the RM703,240.92, Lim Chok Realty as the principal debtor had fully settled Mascotwood's debt. There was therefore no part of the debts which remained unpaid by the principal debtor in respect of which the defendant was under an obligation to contribute to the plaintiff within the meaning of s 99 of the Contracts Act 1950 (see para 11).

[Bahasa Malaysia summary

Plaintif dan defendan masing-masing adalah bapa dan anak lelaki. Kedua-dua adalah pemegang saham di dalam beberapa syarikat keluarga. Salah satu daripada syarikat, iaitu Mascotwood Sdn Bhd ('Mascotwood') telah memperolehi kemudahan perbankan daripada RHB Bank Bhd ('RHB Bank'). Kemudahan-kemudahan dijamin oleh caj sebidang tanah yang dimiliki oleh syarikat keluarga yang lain, Lim Chok Realty Sdn Bhd ('Lim Chok Realty') dan oleh jaminan-jaminan persendirian yang ditandatangani oleh kedua-dua bapa dan anak. Lim Chok Realty adalah penghutang utama. Mascotwood mengingkari bayaran semulanya kepada RHB Bank dan RHB Bank memulakan prosiding terhadap Lim Chok Realty untuk melelong tanah tersebut. Untuk menghalang lelongan tersebut, plaintif membayar RM703,240.92 kepada RHB Bank untuk menyelesaikan keseluruhan hutang Mascotwood. Plaintif mendakwa bahawa wang sejumlah RM703,240.92 adalah wangnya sendiri dan oleh itu menuntut sumbangan 50% daripada defendan. Ia dihujahkan bahawa defendan sebagai penjamin bersama bertanggungjawab untuk menyumbang kepada penyelesaian hutang Mascotwood oleh plaintif. Defendan menafikan liabiliti untuk membayar sumbangan atas alasan bahawa hutang Mascotwood dibayar menggunakan dana Lim Chok Realty dan bukan wang plaintif sendiri.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Atas fakta satu-satu inferens munasabah yang boleh dibuat adalah bahawa wang sejumlah RM703,240.92 yang plaintif guna untuk membayar hutang Mascotwood dimiliki oleh Lim Chok Realty dan bukan wang persendiriannya. Oleh itu soalan sumbangan oleh defendan tidak berbangkit langsung. Tanggungjawab untuk menyumbang hanya berbangkit jika plaintif sebagai penjamin bersama telah menggunakan wangnya sendiri untuk menyelesaikan hutang tersebut. Lim Chok Realty, sebagai syarikat persendirian mempunyai entiti undang-undangnya sendiri berasingan dan berbeza daripada

pemegang-pemegang sahamnya dan pengarah-pengarahnya. Plaintif tidak dapat menuntut milikan persendirian ke atas apa-apa wang di dalam akaun syarikat (lihat perenggan 7).

(2) Dengan bayaran sebanyak RM703,240.92, Lim Chok Realty sebagai penghutang utama telah menyelesaikan sepenuhnya hutang Mascotwood. Oleh itu tidak terdapat apa-apa bahagian hutang yang kekal tidak dibayar oleh penghutang utama berkaitan di mana defendan di bawah tanggungjawab untuk menyumbang kepada plaintif dalam maksud s 99 Akta Kontrak 1950 (lihat perenggan 11).]

Notes

For cases on liability of gurantor, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5059–5071.

Cases referred to

Lim Eow Thoon v Lim Fang Tee & Ors [1958] 3 MC 164 (distd)
Wong Kim Swee v Wong Chee Mun & Ors [1984] 2 MLJ 221, HC (refd)

Legislation referred to

Contracts Act 1950 s 99

Pang Kong Seng (WC Teo with him) (KS Pang & Co) for the plaintiff.
Gan Techiong (Gan & Lim) for the defendant.

Abdul Rahman Sebli J:

[1] The plaintiff and the defendant are father and son respectively. Both are shareholders in several family companies. One of the companies, namely Mascotwood Sdn Bhd ('Mascotwood') in which the plaintiff and the defendant are directors had obtained banking facilities from RHB Bank Bhd ('RHB Bank'). The facilities were secured by a charge of a piece of land at Wakaf Tapai, Terengganu belonging to another family company, Lim Chok Realty Sdn Bhd ('Lim Chok Realty') and by personal guarantees signed by both father and son. By cl 41 of the charge Lim Chok Realty was the principal debtor and the land the principal security for the monies due under the charge. As at January 2011, there were several law suits pending between the plaintiff, the defendant and their other family members concerning the affairs of the family companies. On 28 January 2011 the disputing family members entered into a consent order to settle all their disputes once and for all. According to the terms of the consent order Mascotwood was to be put into voluntary liquidation and was not to make any payment out of its account.

[2] After the consent order was recorded and pending the voluntary liquidation, Mascotwood started to default in its repayment to RHB Bank and

RHB Bank then commenced proceedings against Lim Chok Realty as chargor to auction the land at Wakaf Tapai. To prevent the auction the plaintiff paid RM703,240.92 to RHB Bank to settle the whole of Mascotwood's debts. The plaintiff is alleging that the RM703,240.92 that he used to settle the debts was his own money. What he is now claiming is for contribution by the defendant. He is asking for an order that his son do pay him 50% of the RM703,240.92, which works out to RM351,620.46. The defendant son denies liability to pay the RM351,620.46 as according to him it had been agreed that Mascotwood's debts were to be paid using the funds of Lim Chok Realty and that as a matter of fact it was the funds of Lim Chok Realty that had been used to settle Mascotwood's debts with RHB Bank and not the plaintiff's own money.

[3] Section 99 of the Contracts Act 1950 ('the Contracts Act') provides as follows:

> Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or that part of it which remains unpaid by the principal debtor.

[4] In *Wong Kim Swee v Wong Chee Mun & Ors* [1984] 2 MLJ 221 the High Court in dealing with this provision held that if any co-surety had paid the creditors towards the discharge of the debt and obtained a discharge, then the others were equally liable to contribute to the sum paid towards that discharge. By virtue of this provision it was contended that the defendant as co-guarantor is liable to contribute towards the settlement of Mascotwood's debts by the plaintiff.

[5] The issue to be determined is whether it was the plaintiff's money or Lim Chok Realty's money that was used to settle Mascotwood's debts by payment of the RM703,240.92. If it was Lim Chok Realty's money that was utilised to settle the debts, then the plaintiff has no basis to personally claim for contribution from the defendant. In this regard the letter dated 22 September 2011 written by Messrs Yeo Tan Hoon & Tee who acted as solicitors for Lim Chok Realty and addressed to RHB Bank is crucial. The material parts of the letter read as follows:

> Our client Lim Chok Realty would like to discharge the charge herein as soon as possible. As per your letter dated 15.9.2011, the amount required for the discharge on or before 30.9.2011 is RM705,668.69.
>
> As our client will now be resolving this matter expeditiously, our client requests that in the spirit of goodwill, your client will be able to grant a discount on the interest, as well as on the costs in relation to this Originating Summons and Civil Suit No.22-20-2011 in the Kuala Terengganu High Court.

[6] The purpose of the letter is clear. It was to inform RHB Bank that Lim Chok Realty (as opposed to the plaintiff personally as co-guarantor) wished to discharge the charge as soon as possible. About a week later, ie on 29 September 2011 the plaintiff in his capacity as signatory to the bank account of Lim Chok Realty at the Taman Sentosa Branch of Public Bank Bhd ('Public Bank Taman Sentosa') uplifted six fixed deposits from the company's account and made transfers of RM116,681.40 each into his personal account at the Johor Bahru Branch of the same bank. At the trial the plaintiff admitted that Lim Chok Realty's fund was controlled by him and that the company had more than RM1m in its fixed deposit account at Public Bank Taman Sentosa. He further admitted that he did not have any fixed deposit account with that branch of the bank. The evidence shows that he only had RM923.91 in his personal account.

[7] On the facts the only reasonable inference that can be drawn is that the RM703,240.92 that the plaintiff used to pay Mascotwood's debts belonged to Lim Chok Realty and not his own personal money. Therefore the question of contribution by the defendant does not arise at all. The obligation to contribute only arises if the plaintiff as co-guarantor had used his own money to settle the debts. Lim Chok Realty, being a private limited company has a legal entity of its own separate and distinct from its shareholders and directors. The plaintiff cannot claim personal ownership over any money in the company's account. In cross-examination the plaintiff was evasive when questioned on the six transfers of RM116,681.40 each that he made into his own personal account. At first he was adamant that he had no recollection if the money was transferred from the company's account. It was only after he was confronted with irrefutable proof that the monies came from the fixed deposit account of Lim Chok Realty at Public Bank Taman Sentosa that he grudgingly admitted that the monies had indeed come from the company's fixed deposit account at Public Bank Taman Sentosa. On such a material issue as this, one would expect the plaintiff to be forthright in his answers. The fact that he was not shows that he had something to hide. Having regard to the sum involved and the purpose of the transfer it is improbable that he had no memory of where the money had came from. It is not the kind of transaction that one could easily forget, particularly when it happened less than two years ago. This attempt by the plaintiff to hide the truth undermines his credibility as a witness. I reject his evidence that the RM703,240.92 that he paid to RHB Bank to settle Mascotwood's debts came from his own pocket. I am satisfied that the money came from Lim Chok Realty's account at Public Bank Taman Sentosa and which he transferred to his personal account.

[8] The plaintiff's argument plain and simple is that it is not important whose money it was that was used to settle Mascotwood's debts. What is important according to the plaintiff is who physically settled the debts. In other words it does not matter who owned the RM703,240.92. All that matters is

who effected payment. The following observations made by Thompson CJ in *Lim Eow Thoon v Lim Fang Tee & Ors* [1958] 3 MC 164 at p 171 were cited in support of the proposition:

> I knew of no authority nor has counsel for the applicant been able to show us any that would justify the court in having regard to the source from which the money came or to the subsequent behaviour of the assets of which it was the product. In fact these particular assets appreciated in value. But the money might have been the product of other assets, as for example Japanese bonds, which might have fallen in value. That to my mind is entirely beside the point. What the applicant advanced was money and what he is entitled to have back is money and interest on it.

[9] With due respect to counsel he had completely taken the above passage out of context. The context in which Thompson CJ made the observations was in relation to the following peculiar facts. The applicant in administering the estate of the deceased during the Japanese occupation sold land of his own for $140,000 in order to pay off the funeral expenses, estate and other encumbrances on the lands comprising the estate. He applied for reimbursement of the sum which he had expended out of his own pocket. The trial judge allowed a sum of $4,516 only. The applicant appealed against the order, arguing that the price of land, then and at the time of his appeal and the income that it would have produced if not sold, should all be taken into account. The Court of Appeal, in dismissing the applicant's appeal held that the applicant was only entitled to $4,516 as that was the equivalent of $140,000 in Japanese occupation currency.

[10] Clearly the ratio decidendi of the case has no relevance to the issue before the court in the present action, which is whether the defendant is liable for contribution. The substratum of the plaintiff's argument is structurally faulty. It ignores the simple truth that the RM703,240.92 came from Lim Chok Realty's pocket so to speak and not from the plaintiff's own pocket. It also ignores the fact that the plaintiff had control and dominion over Lim Chok Realty's funds at Public Bank Taman Sentosa. What the plaintiff did if at all was merely to make payment on behalf of Lim Chok Realty towards settlement of Mascotwood's debts by utilising Lim Chok Realty's funds. The fact that the money was paid out from his personal account does not alter the fact that the money belonged to Lim Chok Realty. It would be wrong for the plaintiff to treat the RM703,240.92 as his own money simply because it was money deposited in his personal account. In all probability and it is my finding that the purpose of the transfer to his personal account was to provide sufficient fund to settle Mascotwood's debts by using Lim Chok Realty's funds. Personally the plaintiff was in no financial position to settle Mascotwood's debts of close to RM1m with the meager RM923.91 that he had in his personal account as at 28 September 2011. Thus for all intents and purposes it was Lim Chok Realty and not the plaintiff or the defendant who settled Mascotwood's debts. Indeed this

was Lim Chok Realty's expressed intention as reflected in Messrs Yeo Tan Hoon & Tee's letter dated 22 September 2011.

[11] By payment of the RM703,240.92, Lim Chok Realty as the principal debtor had fully settled Mascotwood's debts. There is therefore no part of the debts which remains unpaid by the principal debtor in respect of which the defendant is under an obligation to contribute to the plaintiff within the meaning of s 99 of the Contracts Act. In the circumstances and for reasons aforesaid the plaintiff's claim was dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum